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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF ROBERT V. PHILLIPS, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent	PCHB No. 79-73 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal from the denial of Odessa Subarea groundwater application No. G3-25406, came before the Pollution Control Hearings Board, Nat Washington, Chairman, Chris Smith, and David Akana (presiding) at a formal hearing in Spokane (January 28, 29, February 11, and March 11, 1980) and in Lacey (March 18 and 19, 1980). Closing arguments were heard in Spokane on March 25, 1980.

Appellant was represented by his attorney, Kermit M. Rudolf; respondent was represented by Laura E. Eckert, Assistant Attorney

General.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, the Board makes these

FINDINGS OF FACT

I

Appellant has permits or certificates for five wells located both within and outside of the Odessa groundwater subarea as defined in ch. 173-128 WAC.[1] Two wells (G3-01341C and G3-01469C) are located within the Odessa groundwater subarea; three wells (G3-01468C and G3-24450P) are located outside the subarea. The wells within the subarea are authorized to withdraw a total of 4676 acre feet per year (primary) at a rate of 4060 gallons per minute (GPM). The wells outside the subarea are authorized to withdraw a total of 6250 acre feet per year (primary) at a rate of 8000 GPM.

II

In May of 1977, after a meeting with respondent, appellant sought to combine his existing certificates and permits, and establish two additional wells located within Section 30, T 16N, R 32E, in Adams County. The application (G3-25406) shows a 6000 GPM (increase) request with no additional volume withdrawal from seven wells, including two new wells.

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1. The waters are used upon the following properties: ALL of Sec. 19, 20, 29 30, E 1/2 of Sec. 18, NW 1/4 of Sec. 32; ALL BEING WITHIN T. 16N., R. 32 E.W.M.; N 1/2 of Sec. 25, SE 1/4 and N 1/2 SW 1/4 of Sec. 13; ALL BEING WITHIN T. 16 N., R. 31 E.W.M. Sec. 5, SW 1/4 of Sec. 4, N 1/2 of Sec. 6, NW 1/4 of Sec. 8, S 1/2 of Sec. 7, SE 1/4 of Sec. 8; ALL BEING WITHIN T. 15 N., R. 32 E.W.M.

Appellant believed there would be no problem with the application after a meeting with respondent in December, 1977, and took steps to arrange for the service of a well driller. At that meeting, respondent's employees did not make any statement or take any action which could reasonably cause appellant to believe that he had permission to drill wells without first receiving a permit. Appellant nonetheless believed that he could drill the wells and in 1978 had two wells drilled in Section 30, located within the Odessa groundwater subarea, without first obtaining the necessary permits. Appellant spent about $266,000 to develop these two wells known as wells 6 and 7. In the fall of 1978, respondent met with appellant to discuss the unauthorized drilling of wells 6 and 7. Respondent's employee indicated that something might still be worked out. Wells 6 and 7 were ultimately approved as additional points of withdrawal under existing permits and certificates within the Subarea, without further increase in GPM or acre feet. Appellant's application for 6000 GPM and no additional acre feet withdrawal was denied by respondent, resulting in the instant appeal. Appellant was not given a "tentative decision" as described in WAC 173-130-150.

III

Appellant seeks to increase his total rate of withdrawal of water through use of two additional wells (Nos. 6 and 7) so he can use the full quantity of water (acre feet) for which he is entitled under his existing permits and certificates within the subarea.[2]

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2. Appellant's application was not clear as to his intent to limit use of water withdrawn from subarea wells upon subarea lands. Appellant does not now seek to use subarea water outside the subarea and our decision is based upon this clarification.

IV

Appellant can remove the total volume of water allowed under his existing permits and certificates (including wells 6 and 7) but only if he pumps at the maximum rate continually from the opening to the close of the irrigation season. Appellant does not want the water continually flowing throughout the irrigation season, but would like to have the water taken out faster than he is presently allowed, when needed.

V

Wells 1 and 3, which are authorized wells located within the subarea, are not capable of producing enough water to use the permitted volume or rate of withdrawal. The Department of Ecology (DOE) has allowed appellant to use wells 6 and 7 to draw additional water up to the GPM limit allowed under existing authorizations for these four wells. Even using the maximum GPM authorized, appellant cannot remove the volume authorized using present water demand characteristics, and appellant would like the maximum GPM authorization to be increased. The approval of more GPM would not increase the maximum water volume authorized, but would increase the volume of water actually used by appellant. The DOE is adamant as to any change in any authorization which would increase water usage beyond that allowed by maximum GPM or maximum volume (acre feet).

VI

Respondent based its decision upon appellant's 6000 GPM request. At the hearing appellant reduced his request to 3600 GPM, 1700 GPM from well 6 and 1900 GPM from well 7, to be used within the

subarea. Respondent is unwilling to grant any increase in maximum GPM for the same reasons it denied the application initially, that is, appellant would be using water withdrawn from the subarea upon lands outside the subarea,[3] and groundwater within the subarea is not available for appropriation without adverse effect on existing users. Further, it was not deemed to be in the public interest to authorize additional withdrawals in an area of potential regulation.

VII

The change in static water level (SWL) during the period 1976-1979 in the vicinity of well 6 was between 0 and -20 feet, and between 0 and +20 feet in the vicinity of well 7. (See Exhibit A-41.) Using data gathered in 1980, the SWL during the period 1977-1980 in the vicinity of wells 6 and 7 have declined more than 20 feet and may very well exceed 30 feet. (See Exhibits R-9, 19; A-43.)

VII

Calculations for a three year period based upon well 6 pumping at 1700 GPM show that it will cause a residual drawdown of 10.8 feet at a one mile radius, and well 7 pumping at 1900 GPM will cause a residual drawdown of 12 feet at a one mile radius. If pumped together, the drawdown will be about 23 feet over a three year period. Added to the existing declines in the location, the granting of the modified request would result in a rate of decline exceeding 30 feet in three

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3. See footnote 2.

years at well 6. Residual drawdown based upon the 6000 GPM request of the application would result in rate of decline exceeding 30 feet in three years at a one mile radius.

Based upon the 1976-1979 period, water is available for appropriation in some amount for well 7 but below that requested in the application or at the hearing.

Based upon the 1977-1980 period, water is not available for any appropriation from appellant's wells 6 and 7.

IX

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The denial of appellant's request to increase GPM over his existing authorizations within the subarea for use within the subarea is contended to be a denial of his present rights. The first question is then, what are appellant's existing rights within the subarea. Appellant has authorization to remove (1) 4676 acre feet of water (2) during a specified irrigation season (3) at a rate of 4060 GPM. Which of these factors limit appellant's rights?

The surface water code, ch. 90.03 RCW, made applicable to groundwater (RCW 90.44.020; RCW 90.44.060), designates measurement of absolute volume or quantity of water in terms of "acrefoot" and flowing water in terms of "secondfoot" (one cubic foot per second of time, or the equivalent to about 450 GPM). RCW 90.03.020. RCW

90.03.260 requires applications to set forth the amount of water requested in acre feet per season. RCW 90.44.060 requires applications for groundwater to state the "amount" of water proposed to be withdrawn in GPM and in acre feet a year. A permit, if one is issued, states the "amount" of water allowed. RCW 90.03.290. Upon a showing that the terms of a permit have been complied with and that an appropriation has been perfected, a certificate issues. RCW 90.44.080. An appropriator receives a right to an "amount" of water that will maintain and provide "safe sustaining yield." RCW 90.44.130.

The statutory terms describe a groundwater right in terms of absolute volume or quantity of water. Appellant has a right to 4676 acre feet of water. The right may be exercised during particular times of the year. Appellant's authorizations specify the period of use. Finally, the right is limited by the allowed rate of withdrawal. Appellant has a right to withdraw water at a rate of 4060 GPM.

The DOE evaluates applications, pursuant to the statutes and regulations, based upon information provided. It follows that appellant's right is based upon such information and is limited by the terms of the grant. Appellant's request for additional GPM is, therefore, a request for an additional right, and not a part of his existing rights.

At the time appellant applied for his earlier authorizations, GPM may not have been regarded as an important factor and instead volume controlled. Consequently, his older applications did not anticipate GPM requirements correctly. His authorizations based upon such

applications are irrational as applied to his present farming practices. He is, nonetheless, limited to those rights he acquired.

II

A ruling on a public groundwater permit application requires the DOE to consider certain provisions of ch. 90.03 RCW (made applicable by RCW 90.44.060) and ch. 90.44 RCW. There are essentially five determinations which must be made prior to the issuance of a groundwater permit: (1) what water, if any, is available; (2) to what beneficial uses the water is to be applied; (3) will the appropriation impair existing rights; (4) will the appropriation detrimentally affect the public welfare; and (5) will the withdrawal of groundwater exceed the capacity of the underground bed or formation to yield such water within a reasonable or feasible pumping lift in case of pumping developments. RCW 90.03.290; RCW 90.44.070. The instant dispute focuses upon the availability of groundwater and detrimental affect to the public welfare.

III

The question of availability of water in the Odessa groundwater subarea is answered, as a practical matter, by the Odessa subarea management regulations, ch. 173-130 WAC. The regulations evince a policy of a limited and controlled rate of decline of the water level in "zone A" (which is the pertinent zone relating to the instant appeal), to a total amount of 30 feet in any three year period (WAC 173-130-060) and to prevent the water table from descending more than 300 feet beneath the altitude of the static water level as measured in 1967 (WAC 173-130-070). Water above the maximum depth will be

depleted under the managed decline at a rate not to exceed 30 feet in any three year period.

IV

Appellant has failed to show that water is presently available in the amount requested for appropriation from the proposed locations within the Odessa groundwater subarea based upon the groundwater information for either three year period 1976-1979 or 1977-1980. The DOE correctly followed the regulations. Had DOE granted the request of either 6000 GPM or 3600 GPM, the evidence shows that a "critical cone of depression" (WAC 173-130-030(5)) would develop in the area of appellant's wells 6 and 7. When such decline would occur, no new withdrawals will be allowed. WAC 173-130-130. Based upon the 1977-1980 data, water is not available in any amount at the proposed locations.

V

We note that where the SWL consistently declines, the regulations seem reasonable. Where the SWL in particular wells exhibit increases or decreases from each year as appellant has experienced, the concept of a managed "decline" appears irrational vis-a-vis wells exhibiting continual declines, at least over the short term because wells with fluctuating SWL's could exhibit varying three year period declines depending upon the beginning point of reference from year to year. The SWL's in the subarea are generally declining, however. Whether water is available under the regulations for a well with a fluctuating SWL is likely to be ephemeral. Thus, appellant's application should be held, at least until the water levels in the area in question have

stabilized, in order to preserve his priority date, and for the further reason that appellant was not given a "tentative decision" under WAC 173-130-150 which provides for keeping an application in a pending status until further information is available.

VI

The doctrine of estoppel may be applied to certain governmental actions in appropriate cases to prevent a manifest injustice when such estoppel will not impair the exercise of governmental powers. Schafer v. State, 83 Wn.2d 618 (1974). The requisites of an equitable estoppel are: (1) an admission, statement or act, inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party arising from permitting the first party to contradict or repudiate such admission, statement or act. Appellant has not met any of these requisites, all of which are necessary to invoke the doctrine.

VII

The DOE order denying the application should be affirmed. However, under the circumstances of this case, the application should be held in a pending status until more data is acquired by DOE through its annual mass measurements in the Subarea.

VIII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The Department of Ecology order denying application G3-25406 is affirmed. The application is remanded to the Department of Ecology to be placed in a pending status until groundwater becomes available.

DATED this 11th day of April, 1980.

POLLUTION CONTROL HEARINGS BOARD

NAT W. WASHINGTON, Chairman

CHRIS SMITH, Member

DAVID AKANA, Member

CERTIFICATION OF MAILING

I, Trish Ryan, certify that I mailed, postage prepaid, copies of the foregoing document on the 14th day of April, 1980, to each of the following-named parties at the last known post office addresses, with the proper postage affixed to the respective envelopes:

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